Supreme Court, U.S.
FILED
SEP 14 1995
CLERK

No. 95-284

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

In Re SHARON N. MILLER,

Debtor

SHARON N. MILLER,

Petitioner

vs.

GERALD GENTRY, Ph.D., and
MICHELINE Z. BURGER,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN RESPONSE

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QUESTION PRESENTED

Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit that guardian ad litem and psychologist fees, incurred in divorce/child custody proceedings and ordered by the state court to be paid in a certain sum by a parent directly to the guardian ad litem and psychologist are excepted from discharge by 11 U.S.C. §523(a)(5)?

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RESPONDENT'S BRIEF IN RESPONSE

Respondents, Gerald Gentry and Micheline Z. Burger, respectfully pray that a writ of certiorari issue to review and affirm the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the matter on May 19, 1995.

STATEMENT OF THE CASE

The Facts

Respondent Gentry was appointed by the District Court of Johnson County, Kansas, to act as a court appointed psychologist on behalf of the children of the petitioner and her former husband, in connection with their pending divorce. Respondent Burger was likewise appointed by the court to act as the guardian ad litem for the children of the petitioner and her former husband. The divorce court entered its order establishing the amount of the fees to be awarded to both respondents, as officers of the court, and allocated those fees between the petitioner and her former husband in roughly the same proportions as their respective child support obligations were allocated, and it characterized those fees as being in the nature of child support. The petitoner later commenced a Chapter 7 bankruptcy proceeding and an adversary proceeding to have the bankruptcy court determine the dischargeability of the debts.

The Rulings Below

The respondents concur with the petitioner's statement of the rulings below.

REASONS FOR GRANTING THE WRIT

Certiorari Should be Granted to Resolve the Conflicts Among the Lower Courts.

For essentially the same reasons stated in the Court of Appeals decision, the respondents believe the fees awarded to them by the divorce court to be paid by the petitioner are non-dischargeable pursuant to 11 U.S.C. 523(a)(5). Respondents agree that the support of family members is no ordinary debt, but that it is a fundamental duty. Audubon v. Shufeldt, 181 U.S. 575 (1901); Wetmore v. Markoe, 196 U.S. 68 (1904). The Court of Appeals for the Tenth Circuit correctly excepted the debts from discharge, acknowledging the superior rights of children to be supported over the goal of the debtor to get a "fresh start.

While there does appear to be a division of authority on the

dischargeability of fees for guardians ad litem and court appointed mental health professionals, the majority of and the better reasoned opinions agree with the decision of the Court of Appeals of the Tenth Circuit. The Courts of Appeals for the Tenth, Second, and Fifth Circuits have all determined that such fees to guardians ad litem and court appointed professional, if in the nature of support, are excepted from discharge. In Re Jones, 9 F. 3d 878 (10th Cir. 1993); In Re Peters, 946 F. 2d 166 (2d Cir. 1992); In Re Dvorak, 986 F. 2d 940 (5th Cir. 1993); In Re Spong, 661 F. 2d 6 (2d Cir. 1981; Matter of Joseph, 55 F. 3d 86 (5th Cir. 1994).

A number of federal district courts have also correctly reasoned that such fees are excepted from discharge. In Re Bakken, 112 B.R. 37 (Bankr. N.D. Okl. 1990); In Re Benz, 36 B.R. 491 (Bankr. Kan. 1983); In Re Cowley, 35 B.R. 520 In Re Poe, 118 B.R. 809 (Bankr. N.D. Okl. 1990); In Re Rank, 12 B.R. 418 (Bankr. Kan. 1981); In Re Ray, 143 B.R. 937 (D. Colo. 1992); In Re Laney, 53 B.R.231(Bankr. Tx. 1985; In Re Lockwood,

148 B.R. 45 (Bankr. E.D. Wis. 1992); In Re Peters, 133 B.R. 291 (S.D.N.Y. 1991). Other cases were cited by the court of appeals below. (App. 7-8)

To interpret 11 U.S.C 523 (a)(5) in any way other than the interpretation given it by the Courts of Appeals of the Tenth, Second, and Fifth Circuits would contravene the plain meaning of the statute and elevate form over substance. This case affords this Court the opportunity to settle this issue and make it certain that court appointed guardians ad litem and mental health professionals who provide services to children caught in divorces will not have their fees discharged in bankruptcy.

CONCLUSION

Wherefore, the respondents respectfully pray that a writ of certiorari be granted and that the Court summarily affirm the decision below.

Respectfully submitted,
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